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Nos. 79-1404, 79-1408, 79-1414, 79-1415, and 79-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PENNHURST STATE SCHOOL AND HOSPITAL, ET AL.,
Petitioners,

v.

TERRI LEE HALDERMAN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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~~MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND~~ BRIEF FOR THE INTERNATIONAL LEAGUE OF SOCIETIES FOR THE MENTALLY HANDICAPPED AND THE ASSOCIATION FOR THE SEVERELY HANDICAPPED, AS *AMICI CURIAE*

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S. REP. No. 160, 94th Cong., 1st Sess. (1973) ..... *passim*

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OTHER AUTHORITIES:

Butterfield, *Some Basic Changes in Residential Facilities*, in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED (rev'd ed., Kugel & Shearer, eds., 1976).. 15

COMPTROLLER GENERAL OF THE UNITED STATES, RETURNING THE MENTALLY DISABLED TO THE COMMUNITY (Report to the Congress, 1977) 24

Glenn, *The Least Restrictive Alternative in Residential Care and the Principal of Normalization*, in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW (M. Kindred, *et al.* ed. 1976) 18

Herr, *Civil Rights, Uncivil Asylums, and the Retarded*, 42 U. CIN. L. REV. 679 (1974) 18

KING, RAYNES & TIZARD, PATTERNS OF RESIDENTIAL CARE: SOCIOLOGICAL STUDIES IN INSTITUTIONS FOR HANDICAPPED CHILDREN (1971) 16

Kushlick, *Wessex, England* in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED (rev'd ed., Kugel & Shearer, eds., 1976) 16

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MAYOR OF PHILADELPHIA,
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COMMISSIONERS AND MENTAL HEALTH/MENTAL RETARDATION ADMINISTRATORS FOR BUCKS, CHESTER, DELAWARE AND MONTGOMERY COUNTIES, PENNSYLVANIA,
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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* FOR THE INTERNATIONAL LEAGUE OF SOCIETIES FOR THE MENTALLY HANDICAPPED AND THE ASSOCIATION FOR THE SEVERELY HANDICAPPED

The International League of Societies for the Mentally Handicapped and the Association for the Severely Handicapped move for leave to file the attached brief *amici curiae*.[1]

1. The International League of Societies for the Mentally Handicapped ("International League") is composed of 86 organizations in 65 countries on 5 continents dedicated to advancing the rights and interests of mentally handicapped people. The individual members of these organizations are parents, educators, therapists, doctors and other professionals in the field of mental retardation. Founded in 1960, the International League has consultative status with UNESCO, the Council of Europe, and other international agencies. Among its other activities, the International League provides experts who offer technical assistance in developing services for mentally handicapped individuals, develops and disseminates educational literature concerning the rights and needs of the mentally retarded, and helps promote the provision of services necessary to enable mentally handicapped persons to participate fully in society to their maximum potential.

2. The Association for the Severely Handicapped ("Association") (formerly the American Association for the Education of the Severely/Profoundly Handicapped) was founded in 1974 to develop, advocate, and implement

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[1] All petitioners and respondents have consented orally to the filing of this brief on the merits but written permission has not yet been received. The suburban county petitioners requested that it be indicated that to the extent this brief is considered a brief in support of the conditonal cross-petition for certiorari of PARC respondents, they do not consent to its filing. Application to the United States of America, intervenor, for consent to file is pending.

the provision of educational and habilitative services for severely and profoundly handicapped individuals. The Association now has more than five thousand members who include parents, educators, therapists, doctors, and other professionals. One of the association's stated objectives is the "rapid termination of living environments and educational/vocational/recreation services that segregate, regiment and isolate persons from the individualized attention and sustained normalized community interactions necessary for maximal growth, development, and the enjoyment of life."

3. *Amici* seek leave to file the attached brief because this case raises crucial issues concerning the rights of all handicapped persons to appropriate treatment, services, and habilitation in the community. In particular, *amici* join respondents and the courts below in seeking to honor Congress's pledge that the "treatment, services and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty." 42 U.S.C. § 6010(2).

4. The United Nations and other international agencies have recognized these same fundamental rights. In 1971, the U.N. Declaration on the Rights of Mentally Retarded Persons was adopted. This Declaration was inspired by—and largely follows—the International League's own Declaration of General and Special Rights of the Mentally Retarded, adopted at its 1968 World Congress in Jerusalem. The U.N. Declaration states that "the mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings." These rights include, according to the U.N. Declaration, the right to "such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential," to live "in surroundings and other circumstances as close as possible to those

of normal life," including living "with this own family or with foster parents" and participating in "different forms of community life" whenever possible. U.N. Declaration on the Rights of Mentally Retarded Persons (December 20, 1971), Articles 1, 2 & 4. The 1975 U.N. Declaration on the Rights of Disabled Persons reaffirms these rights, by providing that all disabled persons, including the mentally retarded, have the right to training, counselling, and other services "which will enable them to develop their capacities and skills to the maximum and will hasten the process of their social integration or reintegration." U.N. Declaration on the Rights of Disabled Persons (December 9, 1975), Article 6.

5. These national and international guarantees and declarations are based on overwhelming professional findings that all handicapped people, including those classified as severely and profoundly retarded, can learn, communicate with others, and enjoy the richness of normal community life. The experts have learned that developing and maintaining the abilities of retarded people requires individualized services and relationships. These are attainable only in integrated, small-scale, community-based environments, and not in institutional settings.

6. The experience of *amici* in research, training, and other activities to promote the rights and interests of retarded individuals provides them with a perspective which differs from that of the parties and other *amici* in this case. From this perspective, *amici*'s brief explains the fundamental errors in the brief of *amici* Congress of Advocates for the Retarded, Inc., *et al.*, and shows that deinstitutionalization is mandated by the record in this case. Unlike Congress of Advocates for the Retarded, Inc., present *amici* rely only on the professional opinions in the legislative and judicial record properly before this Court. This body of expertise supports the trial court's decision to deinstitutionalize all of the residents of the Pennhurst State School and Hospital.

CONCLUSION

Because *amici* have a substantial interest in this case, and because their brief provides an important perspective on the issues before this Court different than that of the parties, this motion for leave to file a brief as *amici curiae* should be granted.

Respectfully submitted,

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BRIEF FOR THE INTERNATIONAL LEAGUE OF SOCIETIES FOR THE MENTALLY HANDICAPPED AND THE ASSOCIATION FOR THE SEVERELY HANDICAPPED, AS *AMICI CURIAE*

INTEREST OF THE AMICI

As set out in detail in the motion for leave to file this brief, *amici* are national and international organizations of professionals and parents interested in securing for retarded individuals quality services necessary for them to grow to their maximum potential. *Amici* believe that the record before the trial court establishes that the Pennhurst State School and Hospital (hereinafter "Pennhurst")—and, by inference other large, isolated institutions of its type—must be abandoned in favor of community-based habilitation. Moreover, *amici* believe that this result is consistent with national policy established by Congress in the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. 6000-6081. *Amici*, therefore, support respondents herein and urge this Court to affirm the decision of the court of appeals except insofar as that decision fails to mandate the deinstitutionalization of all Pennhurst residents.

SUMMARY OF ARGUMENT

The issue addressed in this brief is whether deinstitutionalization of all Pennhurst residents and the provision of appropriate community-based habilitation services to them is justified by the trial court record and compelled by the Developmentally Disabled and Bill of Rights Act, 42 U.S.C. § 6000-6081 (hereinafter "Bill of Rights Act").

On the basis of the testimony of the experts, the courts below and Congress correctly embraced the basic scientific truth that in an appropriate environment all retarded people—even the severely and profoundly retarded—can develop and grow. Contrary to the contention of *amici* Congress of Advocates for the Retarded, Inc., *et al.*, neither the courts below in deciding the merits of the

case nor Congress in enacting the Bill of Rights Act misunderstood the nature of mental retardation.

In addition, the record in this case overwhelmingly justifies the district court's decision to transfer all Pennhurst residents into the community, because Pennhurst, no matter how modified, can never provide the services and environment necessary for habilitation. The court's decision that Pennhurst is a hopeless anachronism mirrors our national policy, as embodied in the Bill of Rights Act, that large-scale institutions like Pennhurst must be abandoned in favor of community-based habilitation.

The expert testimony presented at trial—by many of the same professionals consulted by Congress on the Bill of Rights Act—establishes that community-based services can successfully be provided all mentally retarded people. The district court order is carefully designed to achieve just what Congress mandated—the provision of services, treatment and habilitation in the least restrictive environment.

ARGUMENT

This case is about an abomination—the Pennhurst State School and Hospital. The district court record paints a gruesome picture of life within Pennhurst. Although the mentally retarded residents of Pennhurst pose no threat to our society, they are housed in crowded, unsanitary and understaffed wards, they are physically abused, their medical and educational needs are grossly neglected, and they are routinely sedated or placed in physical restraints. The residents of Pennhurst are segregated from the rest of humankind and denied the stimulus and nurture of the normal community—they simply are stored in a depersonalized, large-scale institution until they quietly die.

On the basis of an extensive record, the district court found that the conditions at Pennhurst are intolerable. The district court also found that it is inherently impos-

sible, in a large-scale, isolated institution like Pennhurst, to provide the services and environment necessary for development and growth. After extensive expert testimony—including *amici's*—about the available alternatives to institutions like Pennhurst, the district court ordered that all Pennhurst inhabitants be removed from the institution, placed in appropriate, small-scale living arrangements in the community, and provided with necessary medical care, instruction and other services.

Although the district court's order was not rooted in the Bill of Rights Act, the district court's decision and remedy are consistent with this Act. The Bill of Rights Act is an international milestone in the advancement of the human rights of the mentally retarded. With its passage, Congress joined the growing international consensus that retarded persons cannot be consigned to large custodial institutions. Instead, Congress recognized that retarded persons have a right to "habilitation"—to the education, training, and care necessary for them to reach their maximum potential. 42 U.S.C. § 6010(1). Equally important, Congress specifically provided that such habilitation "should be provided in the setting that is least restrictive of the person's personal liberty." 42 U.S.C. § 6010(2).[1]

The findings and order of the district court exactly parallel Congress's findings and mandate in the Bill of Rights Act. Both the court and Congress explicitly found that *all* retarded persons—including the severely and profoundly retarded—can develop and grow. Both the court and Congress found, after hearing from the experts, that large, isolated institutions for the mentally

[1] The briefs of respondents and other *amici* will focus more specifically on the congressional mandate of the Bill of Rights Act. Present *amici* will primarily comment instead on the professional and scientific findings which underlie the district court's determination that large-scale institutions like Pennhurst must be rejected in favor of community-based living arrangements for the retarded.

retarded are cruel and inadequate anachronisms. Both the court and Congress mandated that mentally retarded people receive appropriate, individualized, community-based services.

The district court's order was compelled by both the record before the court and Congress's legislative findings. However, in a brief filed in this Court, *amici* Congress of Advocates for the Retarded, Inc., *et al.* (hereinafter "COA") present arguments which are supported neither by the trial record nor by the congressional findings. Nor is there justification for COA's implied suggestion that this Court remake a policy decision already made by Congress.

The conclusions of Congress and the district court are amply supported by a wealth of studies and scientific materials, including some of the very sources cited in the COA brief. Present *amici* will confine their arguments to the body of expert knowledge contained in the legislative and judicial record properly before this Court, all of which demonstrate that the district court's order faithfully implements the congressional findings embodied in the Bill of Rights Act.

I. Both the Courts Below and Congress Correctly Found that All Retarded People Can Develop and Grow in an Appropriate Environment.

The district court's findings in this case are based on an extensive record encompassing 32 days of trial and numerous depositions and other proceedings. The trial alone included testimony from more than 10 experts and numerous Pennhurst officials, employees, and residents; over 100 photographs; a 3-hour videotape film; 288 documentary exhibits; and a statistical and qualitative analysis of a systematic sample of 10% of Pennhurst's records on all of its residents.

A substantial part of the district court proceedings was devoted to evidence concerning the nature of mental retardation. This evidence showed that retarded people

are not fundamentally different from the rest of us. They "are more like normal people than they are dislike normal people . . . [They] have the same ability to love, to hate, to feel joy, pain, sorrow as you and I." J. App. at A310.[2] The record further establishes that retarded people are not mentally ill or diseased, but only that "the development of some of their abilities to do things is at a slower rate than we would normally expect." J. App. at A340. The court accordingly concluded that mental retardation is not a sickness, but an "impairment in learning capacity and adaptive behavior." *Halderman* v. *Pennhurst State School & Hospital*, 446 F. Supp. 1295, 1298 (E.D. Pa. 1977), *aff'd in part, rev'd and remanded in part*, 612 F.2d 84 (3rd Cir. 1979).

As an important corollary, the district court also concluded that "the level of functioning of *every* retarded person may be improved." 446 F. Supp. at 1298 (emphasis added). The COA erroneously argues that this corollary was based on the district court's misconception about the level of retardation at Pennhurst. In fact, the district court explicitly acknowledged that 74% of Pennhurst's residents are "severely to profoundly retarded." *Id.* at 1302. Based on unanimous expert testimony, the trial court still recognized the accepted scientific fact that all retarded persons—*including the severely and profoundly retarded*—can improve and develop.[3] *Id.*

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[2] Appendix references cited to the Joint Appendix of all parties are cited "J. App. at X" and refer to pages numbered A241-A1166. Appendix references cited to the State and County Petitioners' Joint Appendix to the Petitions for Writs of Certiorari filed in Nos. 79-1404, 79-1408 and 79-1415 are cited "J. App. at X" and refer to pages numbered 1a-240a. The district court transcript is cited "Tr. at X."

[3] This capacity to improve is what experts mean in describing retardation as an educational problem. J. App. at A249. They do not mean, as the COA suggests, that the fundamental conditions of retardation can be eliminated merely by providing education. *See* Brief for *amici curiae* COA (hereinafter "COA Brief") at 6.

at 1311. *See* J. App. at A252-62, A266, A310-12, A469-76, A544-49, A631-34, A707-09. The court of appeals concurred with this holding, explaining that "[w]hile the mentally retarded do suffer educational difficulties, the level of their functioning can be improved by individualized training." *Halderman* v. *Pennhurst State School & Hospital*, 612 F.2d 84, 92 (3rd Cir. 1979).

The COA characterizes this finding as "divorced from reality," COA Brief at 6, by asserting that profoundly retarded persons have a mental age of 2 to 2½ years. In implying that such individuals can never learn skills beyond those of a normal two-year-old, the COA misleads the Court.[4] As the district court record shows, mental age refers to a person's *rate* of intellectual growth, not its absolute limit. A person who remains at a mental age of two for many years can master skills far more sophisticated than those of a two-year-old child. He merely masters them at a slower rate. As Dr. James Clements, the former President of the American Association of Mental Deficiency and Chairman of the court-appointed Willowbrook Review Panel, explained at trial, "[S]aying that the intellectual capacity has been reached does not mean that I can't continue to learn, but [that] I can't learn at a higher or more efficient rate than what has already been developed." J. App. at A311-12. As the courts below and other courts have concluded, "Without exception, expert opinion indicates that: 'all mentally retarded persons are capable of benefitting from a program

[4] The suggestion of COA that abnormal behavior is a condition necessarily associated with mental retardation is likewise misleading. COA Brief at 5. Abnormal behavior is largely a result of the environment in which the individual is placed. J. App. at A254-60, A274-75. The evidence at trial showed that the abnormal behavior exhibited by residents of institutions is largely a function of the boredom and sensory deprivation which is generally associated with institutional environments. *Id.* Interestingly, these responses to boredom and sensory deprivations are not unique to retarded persons. Many studies indicate that restrictive institutional environments have devastating effects on *all* people. J. App. at A59-60.

of education and training.'" *Pennsylvania Ass'n for Retarded Children* v. *Pennsylvania*, 343 F. Supp. 279, 296 (E.D. Pa. 1972).[5]

This understanding of the nature of mental retardation is a fundamental premise of the Bill of Rights Act. In considering and passing the Act, Congress specifically rejected views such as those advanced here by COA, that retarded people are ill, that they require indefinite custodial care, and that they are "eternal children" incapable of development. S. REP. No. 160, 94th Cong., 1st Sess. 28 (1973) (hereinafter cited as S. REP. No. 160). *See* J. App. at A251-53. Instead, based on overwhelming evidence and findings, Congress accepted the developmental model of retardation which "stresses that all developmentally disabled individuals have potential for learning and growth." S. REP. No. 160 at 28. Indeed, Congress could not have repudiated the COA position more clearly:

> Developmentally disabled persons for too long have been cast into a number of destructive models which have been used as justification for their rejection and exclusion from the mainstream of society. Some of these models are still prevalent today. They include the view that developmentally disabled persons are sub-human organisms; that they are lacking in many of the needs, aspirations and sensitivities of other human beings.
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> * * * *
>
> [*T*]*he assumption that certain individuals are essentially incapable of development . . . must be rejected.* [*Id.* at 27-28 (emphasis added)]

Based on these legislative findings, Congress specifically provided in section 6010(1) of the Bill of Rights Act

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[5] *See* 446 F. Supp. at 1298; 612 F.2d at 92; Welsch v. Likins, 373 F. Supp. 487, 495 (D. Minn. 1974) (every retarded person, "no matter what the degree or severity of retardation, is capable of growth and development if given adequate and suitable treatment"); Naughton v. Bevilacqua, 458 F. Supp. 610, 614-15 (D.R.I. 1978), *aff'd*, 605 F.2d 586 (1st Cir. 1979).

that all retarded persons have the right to "habilitation." "Habilitation," as defined by the district court, means the "education, training and care required by retarded individuals to reach their maximum development." 446 F. Supp. at 1298.[6]

As the evidence before the district court showed, education and training alone do not provide effective habilitation. Instead, habilitation requires that the environment in which a retarded person is placed be designed to increase the skills of the developing individual. *See* J. App. at A260-61. *See also* J. App. at A311. The person must have sensory stimulation, personal interaction, and the opportunity to use the skills he acquires. J. App. at A258-59. In order to develop, retarded persons—like all persons—must also be challenged. Habilitation programs, such as speech therapy and training in personal and social skills, are part of the environment which influence development. They do not, however, comprise the total environment. In fact, these programs cannot be effective unless the person's surroundings reinforce these skills and encourage him to increase his capacities.

Both Congress and the district court thus recognized that habilitation can only be realized through "normalization." "Under the principles of normalization, the retarded individual is treated as much like the non-retarded person as possible. . . . The basic tenet of normalization is that a person responds according to the way he or she is treated." 446 F. Supp. at 1311.[7] Normal people in

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[6] *See also* Wyatt v. Stickney, 344 F. Supp. 387, 395 (M.D. Ala. 1972), *aff'd in part, remanded in part, sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

[7] COA improperly defines normalization. It argues that normalization is merely the indoctrination of individuals to exhibit socially acceptable behavior and does not include maximization of intellectual potential, independence, or happiness. COA Brief at 10 n.14. As the testimony of former Pennhurst residents themselves shows, p. 21, *infra*, the principle of normalization as embodied in community living arrangements can enhance a retarded person's life

their daily environments are exposed to a wide variety of opportunities and stimuli which are the prerequisite of growth for all people. Placing retarded individuals in an environment as much as possible like that of a normal person will ensure that developmentally disabled persons too have the opportunity to partake of the richness of the world and to develop in response to it.

The corollary of habilitation and normalization, therefore, is the concept of placing retarded people in the "least restrictive environment." As Congress found:

> A final, but critically important dimension of this new model [the developmental model] is that developmentally disabled persons should live like nondevelopmentally disabled persons to the greatest degree possible. Every effort should be made to assist developmentally disabled persons to maximize their ability for self-care and to live normal lives. From this, it also follows that each developmentally disabled person should be allowed to live in the least restrictive environment conducive to his or her maximum development. [S. REP. No. 160 at 28.]

Based on the foregoing findings and policy judgments, Congress also specifically provided in section 6010(2) of the Bill of Rights Act, that habilitation for all retarded persons "should be designed to maximize the developmental potential of a person and should be provided in the setting that is least restrictive of the person's personal liberty."

These twin congressional mandates—that retarded persons have the right to effective habilitation and to live in the least restrictive environment—prescribe the standards by which an institution like Pennhurst must be evalu-

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in a myriad of ways. Moreover, on the basis of the record, the district court found that "[t]he thrust of habilitation through normalization is the remediation of the delayed learning process so as to develop the maximum growth potential by the acquisition of *self-help, language, personal, social, educational, vocational and recreational skills*". 446 F. Supp. at 1311 (emphasis added).

ated. Measured against these standards, Pennhurst is indisputably a failure.

II. Both the Courts Below Correctly Found that Pennhurst Provides Neither Adequate Habilitation Nor an Appropriate Environment for its Residents.

Pennhurst is a product of an earlier era. *See* S. REP. No. 160 at 26-27; J. App. at A253-55. It was conceived at a time when retarded people were considered "defectives" to be segregated from society in totally sheltered environments, both for their own protection and the protection of others. *See* 446 F. Supp. at 1299-1300; S. REP. No. 160 at 26. It was built before society recognized that retarded individuals could develop and grow.

Pennhurst epitomizes the problem of "the tragic warehousing of human beings" which Congress sought to eliminate with the Bill of Rights Act. 121 CONG. REC. 16519 (1975). The overwhelming evidence in this case establishes that habilitation services are not provided at Pennhurst. Instead, the evidence shows that Pennhurst's residents suffer physical abuse and a decreased rate of development, and many have actually regressed from previous levels of achievement.

The appalling conditions at Pennhurst are documented in the record and described in the district court's findings, sometimes in gruesome detail. Pennhurst is unsanitary and unsafe. As the district court found: "There is often excrement and urine on wards floors . . ., and the living areas do not meet minimal professional standards for cleanliness. . . . Obnoxious odors and excessive noise permeate the atmosphere at Pennhurst." 446 F. Supp. at 1308. All living areas at Pennhurst violate the local safety code. J. App. at A821. At least 500 Pennhurst residents live in buildings which Pennhurst's own Superintendent recommended for demolition more than seven years ago. J. App. at A297.

Physical abuse of residents is commonplace. Residents are frequently attacked by other residents, subjected to

physical or chemical restraints, and occasionally battered by the staff. 446 F. Supp. at 1303-10. One expert at trial characterized a summary of accidents during a one-month period as a "battlefield report." J. App. at A290-91. All of the named plaintiffs in this case have suffered serious bruises and scratches, several have lost teeth, and one was hospitalized for two weeks because of head and face injuries he received as a result of a beating. 446 F. Supp. at 1309-10. Physical restraints and seclusion rooms are overused and inadequately monitored. *Id.* at 1306-07. In 1972, an eleven-year-old child strangled to death when tied to a chair in "soft restraints." *Id.* at 1307 n.36. Psychotropic drugs are used without proper monitoring. The use of drugs at Pennhurst does not even "meet minimally professional standards and is physically hazardous to the residents." *Id.* at 1308.

The district court found that the average resident receives less than eight hours of instruction or training per week. *See id.* at 1304. Currently, most residents receive no structured program on the wards designed to increase growth and development. Programs in feeding, showering, and toileting are sporadic and inconsequential. J. App. at A268, A318, A795-96. One hundred six residents are on the waiting list for speech therapy, and nearly every resident at Pennhurst could benefit from some type of communications program. 446 F. Supp. at 1305. Three hundred to four hundred residents presently need physical therapy to prevent physical deterioration, but less than 150 receive it. *Id.*; *see id.* at 1305 n.28. The overwhelming evidence led the court to conclude that "the retarded residents of Pennhurst have not received, and are not receiving, minimally adequate habilitation." *Id.* at 1318.

In addition to documenting the physical degradation and injuries inflicted at Pennhurst, the record shows that the institution has a debilitating psychological impact on residents. One expert testified, "These people have been here so long that they have given up hope." J. App. at

A577. The physical design of the building effectively confines weak and fragile residents to upper floors for years and "many reach a point where they'd rather not go downstairs." J. App. at A578. Residents are crowded into large, stark wards with no opportunity for privacy. They are fed, bathed and toileted in groups. J. App. at A414-15. The district court found that Pennhurst is "isolated," "restrictive," and "almost totally impersonal." 446 F. Supp. at 1303. The atmosphere at Pennhurst generates hostility. "Many of the residents of the cottages are confined for long periods of time," and such confinement "breeds aggression" which "is contagious. People hit one another and when a person gets hit, he hits back." J. App. at A578. Pennhurst's Director of Psychological Services concluded that the environment of Pennhurst has "a crippling effect on behavior, education, and attitudes." *Id.*

This crippling effect has tragic results. At trial, Dr. Clements testified that the "environment at Pennhurst is not conducive to acquiring new skills; indeed, it is more conducive to losing skills that one has already developed." J. App. at A318, A332. As a result, many residents have actually regressed at Pennhurst. A systematic sample of the institution's records revealed explicit notations of regression in the records of more than one-third of Pennhurst's residents. 446 F. Supp. at 1308 n.40. Dr. Clements explained that some individuals who enter Pennhurst able to speak are compelled by the never-ending noise and chaos to retreat into silence. J. App. at A317-18. Similarly, individuals who arrive toilet-trained may lose that capacity because facilities are either unavailable or improperly equipped. J. App. at A332. The district court thus concluded that "[m]any of the residents have suffered physical deterioration and intellectual and behavioral regression during their residency at Pennhurst." 446 F. Supp. at 1309; *see id.* at 1308, 1318; J. App. at A327, A329-30, A417-18.

III. Both the Courts Below and Congress Correctly Found that Large Institutions Like Pennhurst Inherently Cannot Provide an Appropriate Environment for Habilitation.

All the parties to this litigation and the courts below agreed that the conditions at Pennhurst are appalling. *See* 612 F.2d at 92. The critical issue presented in this case is what remedy is appropriate. One approach—apparently favored by COA—would be to try to improve Pennhurst itself. *See* COA Brief at 12-13. The trial record proves, however, that Pennhurst as an institution can never provide either an appropriate environment nor adequate habilitation.

Numerous experts were asked whether an improved Pennhurst would provide adequate habilitation. All said no. For instance, Dr. Alexander Hersh, a consultant and professor of sociology *retained by defendants themselves* to study Pennhurst and to recommend improvements, stated:

> We came to the conclusion that it could not, that there was no way that Pennhurst could be made into an adequate facility. It is simply too far beyond repair and there are just literally hundreds of reasons why this is the case, not the least of which is the fact that Pennhurst as the whole structure, the whole way of operating out there, is simply too far gone. It is simply based on an earlier model, which is just totally obsolete, so that the answer is no. [J. App. at A770.]

This same evaluation was echoed by Dr. Valaida Walker, who had worked with Dr. Hersh in evaluating Pennhurst for the defendants. Dr. Walker testified that the team assigned to determine how to improve Pennhurst concluded instead that should it be closed. "Money spent to upgrade the programs and to upgrade the buildings," Dr. Walker explained, "would just be money down the drain." J. App. at A780.

All parties to this litigation agreed that Pennhurst is a segregated, isolated, inflexible, and depersonalized en-

vironment, presenting few opportunities for residents to develop positive relationships with other people or to practice acquired skills. J. App. at A414-16. Moreover, these conditions at Pennhurst cannot be dismissed as the result of some unique combination of circumstances. They are not the result of a cruel or insensitive staff—the experts complimented the dedication of the staff. *See* 446 F. Supp. at 1324. They are not the result of a unique resident population—the resident population at Pennhurst parallels the population at large institutions across the country. SCHEERENBERGER, PUBLIC RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 12 (1976) They are not the result of insubstantial expenditures—the per capita cost at Pennhurst is among the highest for any large institution of its type. J. App. at 44a ($60 per day). *See* Butterfield, *Some Basic Changes in Residential Facilities*, in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, CHANGING PATTERNS IN RESIDENTAL SERVICES FOR THE MENTALLY RETARDED 15, 22-23 (rev. ed., Kugel & Shearer, eds., 1976). There is no reasonable basis on this record to believe that Pennhurst can be improved sufficiently to provide adequate habilitation.[8]

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[8] The reason institutions like Pennhurst can never provide an environment for adequate habilitation was identified by Dr. Gunnar Dybwad. Dr. Dybwad, who devoted himself for years to improving institutions and who described himself as "an institution man since 1929," explained how he came to realize the inherent inadequacy of institutions:

> Interestingly, it wasn't the bad conditions and our inability to do much about them which have changed my mind, but it has been the repeated and even more impressive demonstration by children and adults with mental retardation of their capacity to live and grow, once we keep them free of the depressing institutional-looking environment.
>
> You see, as long as I could blame the bad conditions on the institutions my energy and that of my colleagues was geared to two remedies—carpeting, better wall covering, all of these things, more staff; but now our energy is really directed to the creation of liberating humans and humane environments in the community with the final objective of closing down institutions. [J. App. at A549.]

Several major empirical studies mentioned in the record have compared large-scale institutions, varying in size from 121 to 1650 residents, with group homes varying in size from 7 to 41 residents in the United States, England and Scandinavia. These studies showed that the quality of life in large institutions, regardless of their size or resident-staff ratios, was uniformly inadequate. In contrast, all group homes were found to be significantly more resident-oriented than any of the large-scale institutions. The group homes were characterized by significantly less rigidity of routine, less regimentation of residents, less depersonalization, and significantly more interaction between staff and residents.[9]

Not only the experts but also the residents condemn institutions like Pennhurst. At trial, one expert described the results of a seminar that he conducted with severely retarded persons to determine what they thought of their institutional environments and what alternatives they would prefer. Given the choice between an institutional environment and a community living situation, these persons consistently preferred the latter. The expert explained that the residents expressed a desire "for privacy"—to live elsewhere than "in the enormous ward with a lot of others." Tr. at 4-104. *See* J. App. at A295. He reported that, "without exception" the residents tended to express "a fear" of the institution: "They were just afraid that they were dominated by something bigger than them, and they wanted to move down the scale to something they could cope with." *Id.*

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[9] These studies, which were described in the testimony of Drs. Dybwad and Lancaster-Gaye, J. App. at A422-23, A549-51, are set forth in KING, RAYNES & TIZARD, PATTERNS OF RESIDENTIAL CARE: SOCIOLOGICAL STUDIES IN INSTITUTIONS FOR HANDICAPPED CHILDREN (1971) (England); McCormack, Balla & Zigler, *Cross-Institutional, Cross-Cultural Study*, 80 AM. J. OF MENTAL DEFICIENCY 1-17 (1975) (United States and Scandinavia); and Kushlick, *Wessex, England* in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED, 297-312 (rev. ed., Kugel & Shearer, eds., 1976).

The district court's conclusion that Pennhurst does not and cannot provide adequate habilitation for its residents, reflects similar conclusions reached by Congress in the Bill of Rights Act about institutions like Pennhurst. Congress heard a great deal of testimony about the conditions at Willowbrook in New York, Partlow in Alabama, Rosewood in Maryland, and numerous other institutions similar to Pennhurst. *See, e.g., Hearings on S427 and S458 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare*, 93d Cong., 1st Sess. 230 (1973). It also heard testimony that attempts to improve these institutions have repeatedly proved unsuccessful. *See id.* at 30; 121 CONG. REC. 16516 (1975).[10]

Thus, the Senate Labor and Public Welfare Committee found that "[m]any of these institutions *by their nature*, their size, their isolation, their impersonality, *are unsuitable* for treatment, education, and habilitation programs." S. REP. NO. 160 at 33 (emphasis added). As the Committee Chairman noted in the closing floor debate on the Bill of Rights Act, "The abuses are too commonplace to point at a single institution, or a single abuse and say that it is an anomaly." 121 CONG REC. at 16516-17. Large institutions like Pennhurst simply cannot provide adequate habilitation.

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[10] Indeed, the federal court in the Willowbrook case, after extensive efforts at institutional reform, found that the "goals of normalization and development of the mentally retarded cannot be met until every effort is made to physically and socially integrate the class members into the community." New York State Association for Retarded Children v. Carey, No. 72-C-356/357, Memorandum Decision and Order, slip op. at 11 (E.D.N.Y. June 10, 1977).

IV. Both the Courts Below and Congress Found that Necessary Habilitation Can Be Provided Only Through Community-Based Services.

A. *The District Court Record Shows that Community Living Arrangements Are Flexible and Can Be Tailored to Individual Needs.*

The district court prescribed the remedy in this case after hearing extensive testimony about the alternatives to monolithic institutions like Pennhurst. This testimony depicted the wide variety of small-scale, personalized, community-based services which are frequently termed "community living arrangements."

One witness described the system of services available in Nebraska, which is much like the network in Pennsylvania. J. App. at A928-42, A983, A1029. The diverse Nebraska system includes, for example, group residences for six to eight persons, and even smaller residential arrangements such as foster homes. It also encompasses a wide spectrum of vocational training programs, including in-home training services and integrated preschools attended by both retarded and non-retarded children. *Id.*

Pennsylvania's community living programs, too, reflect a variety of alternatives. These alternatives include, for example, an infant motivation program providing three to four hours of daily instruction for profoundly retarded children living in their natural homes, and a counseling and support plan for three moderately retarded adults living in an apartment and working in the community. J. App. at A450-68. *See also* J. App. at A496-505.[11]

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[11] For a description of other forms of community living arrangements, *see* Herr, *Civil Rights, Uncivil Asylums, and the Retarded*, 42 U. CIN. L. REV. 679, 765-769 (1974); Glenn, *The Least Restrictive Alternative in Residential Care and the Principal of Normalization*, in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW 499-514 (M. Kindred, *et al.* ed. 1976).

The testimony at trial refutes COA's suggestion that retarded persons with heterogeneous needs, who are placed in small-scale community living arrangements, cannot receive the highly specialized services they need. COA Brief at 15-16. In fact, because of the scale, flexibility and access to community resources provided by community living arrangements, such people can obtain a more sophisticated and extensive range of services than in any isolated, monolithic institution. "Can you imagine setting up [in] an institution serving 1200 or 1500 persons, a medical facility of the type of quality that one can find in a major city like Philadelphia?" asked one expert at trial. "It simply can't be done." J. App. at A708-09. *See also* Tr. at 5-135, 5-143.

Community living arrangements do not entail, as COA argues, simply treating retarded people "as if they were already normal." COA Brief at 14. The community-based services ordered by the district court are designed to treat a retarded person "as much like the non-retarded person *as is possible.*" 446 F. Supp. at 1311 (emphasis added). As the trial testimony made clear, a community living arrangement designed for profoundly retarded people will not allow these people to starve in the aisles of the local grocery store. *See* COA Brief at 5. In addition to providing such people with necessary nourishment, however, it might also afford them the opportunity, with proper supervision, to explore the neighborhood grocery store. A community living arrangement structured for severely retarded people will not force such individuals to negotiate public bus systems, if they are incapable of doing so. However, it might provide them with carefully sequenced instruction in which they are accompanied on public buses until they learn specific routes. *See* J. App. at A614-15. A community living arrangement structured for mildly retarded individuals will not place such people in a local educational program unsuited to their needs. However, it might allow such children to attend classes in a neighborhood school providing specialized instruction

for the developmentally disabled. *See* J. App. at A471-A509, A530-32, A687. As the trial record thus illustrates, community-based programs facilitate individualized, flexible habilitation.

Moreover, because of their flexibility and use of existing community resources, community living arrangements are a generally less expensive mode of care than warehousing mentally retarded persons in large institutions like Pennhurst. On the basis of the evidence, the district court concluded that the cost of running Pennhurst in 1976, excluding the fair rental value of the buildings, averaged $60 per resident per day. The statewide cost of community living arrangements in Pennsylvania in the same year was $17.64 per resident per day, plus $10 per day for care and instruction for one-third of such persons. 446 F. Supp. at 1312. Moreover, the trial court's findings were based on the current costs of Pennhurst and not on costs which would be incurred if proper medical and habilitation services were provided.

B. *The District Court Record Shows that Community-Living Arrangements—Unlike Large-Scale Institutions—Can Successfully Provide Habilitation for All Retarded People.*

Community-based habilitation programs are not only individualized and flexible; they are also highly successful for all mentally retarded persons. The experts testifying about community living arrangements agreed that such alternatives immeasurably improved the lives of persons who had previously been condemned to large-scale institutions like Pennhurst. One expert at trial, for example, described a comprehensive survey of people transferred from a large Nebraska institution into community-based programs. This study analyzed individuals' movement from more highly structured community living arrangements to less highly structured arrangements, and their development of skills such as speech, personal hygiene, and physical mobility. The study unequivocally demonstrated "quite a rapid progress of individuals after

they left the institutional services." J. App. at A488-89. In fact, most of the 135 adults who had to be placed in a highly structured residential setting after leaving the institution were able to transfer to a semi-independent setting in just two years. Many of the children who were on liquid diets because they could not chew or swallow when they left the institution were eating regular food independently in just two years. *Id.*

The results of the Nebraska survey are not unusual. For example, one expert interviewed former Pennhurst residents who had been placed in community living arrangements. She concluded that these individuals, like those in Nebraska, were rapidly progressing toward more independent living arrangements and improving their skills. J. App. at A504-06. Another witness described a foster and group home system in Michigan in which profoundly retarded and highly handicapped individuals are placed in local homes. The system is so successful that there are virtually no new admissions to the regional large-scale institutions. J. App. at A552-54.

In addition to professionals in the field, mentally retarded people and their families attested at trial to the success of community-based habilitation. For example, Mrs. Grace Auerbach reported that her son had learned more in three and one-half years in the community than in his 38 years at Pennhurst. He is now able to talk, walk, work, and keep his own bank account. J. App. at A612-16. Robert Troester, who is now living in a group home, poignantly contrasted his experience at Pennhurst with the dignity of his new life. At Pennhurst "there's too many fights, too many arguments, too many stealings going on and all that, robberies, undesired things. . . . I used to do bad things too, but now I changed myself. I am a different kind of man now." J. App. at A594. *See also* J. App. at A595, A603, A609.

In addition, contrary to COA's claim, the record demonstrates that community living arrangements can benefit even profoundly retarded people and those with

multiple handicaps and significant medical needs. For example, one expert testified that when she initiated Nebraska's pioneer program in community living arrangements, she was concerned about taking "severely, profoundly retarded, multiple handicapped, medically complex" people out of the large-scale institutions. J. App. at A480. Nevertheless, the program provided such people much more complete and individualized care than they had previously received, and the improvement of such persons' health and skills—including the ability to express themselves—was dramatic. J. App. at A480-86, A488-95. *See also* J. App. at A931. Indeed, another expert testified that the profoundly and severely retarded benefit *most* from a small-scale community living arrangement, since "what they need basically is a small stimulating environment where their physical needs receive attention." J. App. at 551-53. As the trial court concluded, based on an extensive record, all of Pennhurst's residents can benefit from appropriate placement in community-based living arrangements.

This success record of community living arrangements completely refutes COA's suggestion that small-scale community living arrangements isolate retarded people in a hostile and unaccepting world. COA Brief at 15. Extensive testimony at trial established that deinstitutionalized mentally retarded persons interact with and are accepted by the communities in which they live and work. For example, in Nebraska, when even children with multiple handicaps are placed in normal pre-schools,

> the kids would interact with all the normal kids and the normal kids would interact with the handicapped children also and we found phenomenal growth—we also found that the normal kids love it. It is another old myth that the non-handicapped kids will not accept the handicapped kids. [J. App. at A472-73.]

Similarly, the mother of a former Pennhurst resident testified that although she initially opposed her son's release from Pennhurst, when she saw his outstanding

progress outside the large-scale institutional setting, she was delighted with his return to the community. J. App. at A617-20. *See also* J. App. at A684-694.

In fact, contrary to COA's suggestion, the district court record demonstrates that community living arrangements provide human interaction and supportive peer group relations which are unavailable at institutions like Pennhurst. The size, impersonality, and lack of services at Pennhurst makes residents physically abusive of themselves and of their peers. J. App. at A255. When placed in community-based programs, however, these same people cease such violent and antisocial behavior. J. App. at A463-64. Many persons responded to the cacaphony and hostility of Pennhurst by retreating into silence and simply refusing to talk or communicate with anyone. J. App. at A578, A255. These very same people, when placed in the so-called hostile real world, exhibited rapid improvement and willingness to use communication and social skills. J. App. at A688-90, A317-18.

This contrast between institutional and community-based environments illustrates the truly "less restrictive" nature of the successful habilitation offered by community living arrangements. The district court decision in this case does not suggest that retarded people be released without supervision or supportive services. The court properly recognized, however, that through the integrated, individually tailored habilitation possible in community-based programs, retarded persons can attain some measure of control over their lives. They can enjoy opportunities to interact with different kinds of people, to participate in the world around them, to make many of the simple, everyday decisions that ordinary people make, and to achieve a previously unknown sense of happiness and dignity. In short, they can experience the personal development and true liberty which institutions like Pennhurst cruelly preclude.

C. *The District Court's Specific Remedy Exemplifies the Effective Community-Based System of Services Mandated by Congress in the Bill of Rights Act.*

The district court ordered the transfer of Pennhurst residents into appropriate community living arrangements providing individualized habilitation. The district court's order is thorough and careful. All Pennhurst residents are to be placed in "suitable community living arrangements" as soon as it is "certain that each and every retarded resident who is moved from Pennhurst can be accommodated in a community facility which will provide minimally adequate habilitation." 446 F. Supp. at 1325 and 1326. The defendants below, in conjunction with this placement procedure, must "develop and provide a written individualized program plan, formulated in accordance with professional standards." *Id.* at 1326. They must also "provide all necessary and proper monitoring mechanisms to assure that community living arrangements and other community services of the necessary quantity and quality are provided and maintained." *Id.* Finally, they must recruit and train a "sufficient number of qualified community staff" to prepare individual exit and community plans for each Pennhurst resident, and then to "develop, maintain, and monitor" the community living arrangements required. *Id.* at 1327.

While, as COA argues, a standardless, sloppily designed and inadequately monitored community living arrangement system might fail, COA Brief at 20, the remedy ordered in this case will not. The district court's remedy contains all the requirements identified by the experts at trial for successfully providing habilitation in the community. *See* J. App. at A497-509. *See also* COMPTROLLER GENERAL OF THE UNITED STATES, RETURNING THE MENTALLY DISABLED TO THE COMMUNITY (Report to the Congress 1977). The court's order foresees the creation of a coordinated, individualized, carefully monitored, and professionally staffed system of community-based services, which will build upon Pennsylvania's already highly suc-

cessful network of community living arrangements. Moreover, the court appointed a Special Master to execute the specific requirements of its order. The Master is now drafting implementation plans for each county in Pennsylvania. These plans detail procedures for placing residents in the appropriate community arrangement, providing them with necessary services, and evaluating their progress. Moreover, the Master is surveying the community living arrangements and other services currently available in each county and ascertaining what additional residences and resources must be developed. Finally, she is estimating the costs of implementation and is projecting, for each county, a timetable for the establishment of the new services which will be needed by former Pennhurst residents. *See, e.g.*, Special Master's Draft Plan, Bucks County (1979).

The district court's remedy is precisely the type of replacement for large-scale institutions which the Bill of Rights Act mandates. Congress recognized that effective deinstitutionalization is required to provide "treatment, services, and habilitation" in the setting that is "least restrictive of the person's personal liberty." 42 U.S.C. § 6010 (1) and (2):

> It must be recognized that the vast majority of developmentally disabled persons and the vast majority of persons now institutionalized should not be in these institutions at all. Efforts to assure proper treatment, education and habilitation services in large institutions should not deflect attention from the fact that most of these institutions themselves are anachronisms, and that rapid steps should be taken to phase them out. Many of these institutions by their very nature, size, their isolation, their impersonality, are unsuitable for treatment, education, and habilitation programs. [S. REP. No. 160 at 32.]

Therefore, Congress mandated the "development of community alternatives," *id.* at 33, and this is precisely what the district court ordered.[12]

COA argues that a "widespread movement to [community living arrangements] from large institutions . . ., which are subject to public oversight and constitutional standards," COA Brief at 21, is undesirable. This argument is misconceived. The evidence at trial established that "public oversight and constitutional standards" have been wholly inadequate to ensure the residents of Pennhurst and similar facilities with habilitation and a growth-inspiring environment. More importantly, Congress adopted the overwhelming concensus of the experts that retarded citizens can no longer be isolated in large-scale institutions, and accordingly made the policy decision that large-scale institutions must be replaced with smaller scale, more personalized community care.

CONCLUSION

In some quarters, of course, doubts about deinstitutionalization remain. Even well-meaning friends and relatives of retarded persons may hold traditional prejudices that no mentally retarded person has the capacity to live in the community. Institutional staff and their unions may oppose deinstitutionalization because of "concern with jobs, status, job security and job opportunities." J.

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[12] Indeed, Congress itself has taken steps to ensure the continued success of community-based habilitation. Federal legislation enacted over the last 15 years provides federal suport for localized educational, medical, vocational and other services for handicapped and retarded people. *See* the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*; The Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.*; and the Social Security Act, Titles XIX and XX, 42 U.S.C. §§ 1396d(d), 1397. The existence of federally-subsidized community programs has made it easier for society to reintegrate the mentally retarded into the community and still provide habilitation services. J. App. at A706-07.

App. at A568-69.[13] These doubts and fears, however, cannot justify alteration of the order below. COA simply cannot now remake the trial court record establishing the appropriateness of the court's deinstitutionalization remedy in this case. Nor can they overturn in this Court the fundamental policy decision made by Congress that all retarded persons have a right to true habilitation in the least restrictive setting.

For the foregoing reasons, the judgment of the court of appeals should be affirmed except insofar as it fails to mandate the deinstitutionalization of all Pennhurst residents.

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[13] Such concerns apparently are felt by COA. *See* COA Brief at 19 (discussion of job conditions, salaries, and absence of "career ladder" if deinstitutionalization takes place). *See also* Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428, 433 (1977).